

AN EMPIRICAL STUDY OF THE VINDICATED DISSENTS OF
THE NEW YORK APPELLATE DIVISION, FOURTH
DEPARTMENT, FROM 2000 TO 2010

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To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less-differing views of one's colleagues; to address precisely the points of law that one considers important and no others; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender—that is indeed an unparalleled pleasure.¹

I. INTRODUCTION

Dissenting opinions represent a personalized and useful viewpoint of legal issues. In addition to the feeling of personal satisfaction (as noted in Justice Scalia's introductory quotation), there are many benefits to dissenting opinions. First, a dissenting opinion provides an honest illustration of the different feelings of the court toward both the issue and the facts surrounding a case.² The dissent "shows exactly who disagrees, with what and why there is a disagreement as well as the extent and depth of that disagreement."³ A second benefit to dissents is the beneficial competition for the majority opinion.⁴ Majority opinions, when presented with a dissenting opinion, need to carefully reinforce their legal analysis by admitting the limitations of their rationale, omitting unpersuasive arguments, and removing lackadaisical

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¹ Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 42.

² Robert G. Flanders, *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 406 (1999).

³ *Id.*

⁴ *Id.*

language.⁵ Third, a dissent is the best place to unearth a judge's true beliefs, preferences, and personal philosophy.⁶ "In short, a dissenting opinion is usually the authoring Justice's personal tongue-lashing (pen-lashing?) of his colleagues. And it's one that is so ardently felt that the Justice feels compelled to go public."⁷

Finally, authoring a dissent gives a justice, or justices, the ability to influence the holdings of other courts, and may occasionally become vindicated by a higher court.⁸ Dissenting opinions can serve as templates to a later court's opinion, outlining a legal analysis that may mark a more persuasive, or well-founded rationale for the outcome of a particular future case. It is this last benefit that this article concerns itself with: dissenting opinions that were ultimately found, on appeal, to present a better founded rationale for a particular case. More specifically, this article is an empirical study of the dissenting opinions of the New York State Appellate Division of the Supreme Court, Fourth Department, over the past ten years, focusing specifically on those dissenting opinions that were ultimately vindicated⁹ by the Court of Appeals.

It is important to realize at the outset that the data presented within this article is merely a "niche" in the total caseload that the Fourth Department hears. This study is only concerned with cases that resulted in a divided panel¹⁰ of the Fourth Department within the last ten years. To put this in perspective for the reader, this study specifically deals with 350 of the approximately 20,490 cases heard by the Fourth Department over the past ten years, which is less than two percent of the total cases heard by the Fourth Department since January 1, 2000.¹¹ Additionally, this article in no way holds itself out as a perfect empirical study. Despite thorough research efforts, it is entirely possible—and likely—that a few dissenting opinions remain at large.

It is also important to emphasize that this is an empirical study,

⁵ *Id.*

⁶ Peter A. Mancuso, *The Independent Jurist: An Analysis of Judge Robert S. Smith's Dissenting Opinions*, 73 ALB. L. REV. 1019, 1020 (2010).

⁷ Vincent Martin Bonventre, *Justice Alito's Goat—What Gets It? (Part 1)*, N.Y. COURT WATCHER (Feb. 16, 2010), <http://www.newyorkcourtwatcher.com/2010/02/justice-alitos-goat-what-gets-it.html>.

⁸ Flanders, *supra* note 2, at 6.

⁹ For the purposes of this study, "vindication" refers to those dissenting opinions issued by a Fourth Department justice, and ultimately affirmed on appeal in outcome and rationale by the Court of Appeals.

¹⁰ For the purpose of this study, a "divided panel" refers to a case where a dissenting opinion was issued.

¹¹ See *infra* Table 1.

meaning that this article is only concerned with the statistics. The statistics and data presented herein should not suggest to the reader that one justice is superior to another, nor should they suggest that certain justices feel more strongly or less objectively about certain issues than other justices. The data in this study is intended only to present an empirical point of view with respect to the voting behavior of the justices of the Fourth Department, specifically in those cases where a dissent was issued and that dissent's rationale was ultimately vindicated by the Court of Appeals.

Part II of this article gives a brief overview of the Fourth Department, as well as a general overview of the Fourth Department data. Part III is an empirical exploration of the dissenting behavior of the Fourth Department justices, including the behavior of the empirically "average" Fourth Department justice. This section further presents the vindication rates of various Fourth Department justices, and certain voting trends by Fourth Department justices when on a divided panel. Finally, Part IV takes a closer look at trends presented within those cases where a Fourth Department dissent was ultimately vindicated by the Court of Appeals. Part IV further examines whether the vindication rates of the individual justices influence the voting behavior of other justices, and further examines noticeable trends in both criminal and civil law.

II. THE FOURTH DEPARTMENT

A. *An Overview of the Fourth Department*

The Fourth Department covers twenty-two counties that are located predominately throughout western and central New York State.¹² Geographically, the Fourth Department's jurisdiction covers from Chautauqua County, the southwestern-most county in New York State, up north to Niagara County; over west and further north to Jefferson and Herkimer Counties; and southeast to Steuben County.¹³ The Fourth Department includes the upstate

¹² *Appellate Divisions*, N.Y. ST. UNIFIED COURT SYS., <http://www.nycourts.gov/courts/appellatedivisions.shtml> (last updated Aug. 11, 2006).

¹³ N.Y. STATE UNIFIED COURT SYS., *THE NEW YORK STATE COURTS: AN INTRODUCTORY GUIDE* 2-3 (Sept. 2010) [hereinafter *AN INTRODUCTORY GUIDE*], available at <http://www.nycourts.gov/admin/NYCourts-IntroGuide.pdf>.

New York cities of Buffalo, Rochester, and Syracuse.¹⁴

Over the past ten years, the Fourth Department has decided approximately 1863 appeals each year.¹⁵ The Fourth Department takes these appeals from civil and criminal trial court decisions from trial courts, appellate terms, and county courts located throughout western and central New York.¹⁶ The majority of these appeals are decided through the use of memoranda opinions, as opposed to having a single justice issue a formal opinion.¹⁷ These appellate opinions are required to at least “briefly state the grounds of [the] decision,”¹⁸ and must also state whether any justices dissent from the opinion.¹⁹

Before an opinion is authored, a Fourth Department justice must be well-versed on the legal issue. Before argument, a justice has access to the records, briefs, and a case report prepared by the legal research assistants.²⁰ After the argument, the justices will consult with each other and give oral reports of the cases to the panel.²¹ Subsequently, a final vote will be made orally at conference, with the justices casting their votes in the order of reverse seniority.²²

Justices on the Fourth Department, like the other appellate departments, are selected from the supreme courts, and are appointed by the Governor of New York State.²³ Justices serve five-year terms or the remainder of their unexpired terms if they have less than five years left on their current terms.²⁴

There are currently twelve justices on the Fourth Department.²⁵ The current Presiding Justice is Henry J. Scudder, who was designated to the Fourth Department in 1999 and was appointed

¹⁴ *Id.*

¹⁵ *See infra* Table 1.

¹⁶ AN INTRODUCTORY GUIDE, *supra* note 13, at 7.

¹⁷ ALAN D. SCHEINKMAN & DAVID D. SIEGEL, PRACTITIONER’S HANDBOOK FOR APPEALS TO THE APPELLATE DIVISIONS OF THE STATE OF NEW YORK 101 (N.Y. State Bar Ass’n, 2d ed. 2005).

¹⁸ N.Y. C.P.L.R. 5522(a) (McKinney 1995).

¹⁹ N.Y. C.P.L.R. 5712(a) (McKinney 1995). If two justices dissent, there is the potential for an appeal as of right to the Court of Appeals. N.Y. C.P.L.R. 5601(a) (McKinney 1995).

²⁰ SCHEINKMAN & SIEGEL, *supra* note 17, at 105.

²¹ *Id.* Note that not all cases are decided in this manner. Instead, some cases are taken home with the justice for a written report and opinion. Any judge in disagreement will notify the Court before the next conference. *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *The Court*, APPELLATE DIV., FOURTH JUD. DEP’T, <http://www.nycourts.gov/courts/ad4/Court/Judges.html> (last visited Dec. 10, 2010).

Presiding Justice in 2006.²⁶ Currently, the eleven associate justices include: Justice Edward D. Carni, Justice John V. Centra, Justice Eugene M. Fahey, Justice Samuel L. Green, Justice Jerome C. Gorski, Justice Stephen K. Lindley, Justice Salvatore R. Martoche, Justice Erin M. Peradotto, Justice Elizabeth W. Pine, Justice Rose H. Sconiers, and Justice Nancy E. Smith.²⁷

In addition to the current Fourth Department justices, this study also includes decisions in which many former Fourth Department justices took part. These distinguished alumni include former Presiding Justice Eugene F. Pigott, Jr. (now of the Court of Appeals), Justice John P. Balio, Justice Christopher J. Burns, Justice Leo F. Hayes, Justice Robert G. Hurlbutt, Justice L. Paul Kehoe, Justice John H. Lawton, Justice Robert J. Lunn, and Justice Donald J. Wisner.²⁸

B. An Empirical Overview of the Fourth Department

Between January 1, 2000 and October 1, 2010, the Fourth Department issued approximately 20,490 decisions, including 350 cases that featured a dissenting opinion. Of these 350 divided panels, the Court of Appeals ultimately overruled the majority opinion and reversed 35 times.²⁹ Thirty of these thirty-five

²⁶ *Presiding Justice Henry J. Scudder*, APPELLATE DIV., FOURTH JUD. DEP'T, <http://www.nycourts.gov/courts/ad4/Court/scudder.html> (last visited Dec. 10, 2010).

²⁷ *The Court*, *supra* note 25.

²⁸ *Biographies of Former Justices of the Appellate Division, Fourth Department*, APPELLATE DIV., FOURTH JUD. DEP'T, <http://www.nycourts.gov/courts/ad4/Court/former.html> (last visited Dec. 10, 2010).

²⁹ *Hess v. W. Seneca Cent. Sch. Dist.*, 71 A.D.3d 1568, 899 N.Y.S.2d 490 (App. Div. 4th Dep't 2010), *rev'd*, 15 N.Y.3d 813, 934 N.E.2d 879, 908 N.Y.S.2d 146 (2010); *People v. Edwards*, 65 A.D.3d 829, 884 N.Y.S.2d 528 (App. Div. 4th Dep't 2009), *rev'd*, 14 N.Y.3d 741, 925 N.E.2d 576, 898 N.Y.S.2d 538 (2010); *Lighthouse Pointe Prop. Assocs. LLC v. N.Y. State Dep't of Env'tl. Conservation*, 61 A.D.3d 88, 872 N.Y.S.2d 766 (App. Div. 4th Dep't 2009), *rev'd*, 14 N.Y.3d 161, 924 N.E.2d 801, 897 N.Y.S.2d 693 (2010); *Anderson v. Town of Chili Planning Bd.*, 59 A.D.3d 1017, 873 N.Y.S.2d 796 (App. Div. 4th Dep't 2009), *rev'd*, 12 N.Y.3d 901, 913 N.E.2d 407, 885 N.Y.S.2d 21 (2009); *People v. Backus*, 56 A.D.3d 1119, 867 N.Y.S.2d 290 (App. Div. 4th Dep't 2008), *rev'd*, 14 N.Y.3d 876, 929 N.E.2d 396, 903 N.Y.S.2d 333 (2010); *Infante v. Dignan*, 55 A.D.3d 1258, 865 N.Y.S.2d 167 (App. Div. 4th Dep't 2008), *rev'd*, 12 N.Y.3d 336, 907 N.E.2d 702, 879 N.Y.S.2d 824 (2009); *Schosek v. Amherst Paving, Inc.*, 53 A.D.3d 1037, 862 N.Y.S.2d 227 (App. Div. 4th Dep't 2008), *rev'd*, 11 N.Y.3d 882, 901 N.E.2d 749, 873 N.Y.S.2d 256 (2008); *People v. Buchanan*, 53 A.D.3d 46, 859 N.Y.S.2d 791 (App. Div. 4th Dep't 2008), *rev'd*, 13 N.Y.3d 1, 912 N.E.2d 553, 884 N.Y.S.2d 337 (2009); *Kassis v. Ohio Cas. Ins. Co.*, 51 A.D.3d 1366, 856 N.Y.S.2d 797 (App. Div. 4th Dep't 2008), *rev'd*, 12 N.Y.3d 595, 913 N.E.2d 933, 885 N.Y.S.2d 241 (2009); *Doe v. Roman Catholic Diocese of Roch.*, 51 A.D.3d 1392, 857 N.Y.S.2d 866 (App. Div. 4th Dep't 2008), *rev'd*, 12 N.Y.3d 764, 907 N.E.2d 683, 879 N.Y.S.2d 805 (2009); *In re Buffalo Prof'l Firefighters Ass'n, Local 282*, 50 A.D.3d 106, 850 N.Y.S.2d 744 (App. Div. 4th Dep't 2008), *aff'd as modified*, 13 N.Y.3d 803, 918 N.E.2d

reversals were based on the Court of Appeals adopting the rationale of the dissenting opinion—or, in other words, “vindicating” the dissenting opinion.³⁰ Thus, when the Court of Appeals overrules a

887, 890 N.Y.S.2d 375 (2009); *Kish v. Graham*, 40 A.D.3d 118, 833 N.Y.S.2d 313 (App. Div. 4th Dep’t 2007), *rev’d sub nom. Arons v. Jutkowitz*, 9 N.Y.3d 393, 880 N.E.2d 831, 850 N.Y.S.2d 345 (2007); *Ramos v. Howard Indus., Inc.*, 38 A.D.3d 1163, 831 N.Y.S.2d 615 (App. Div. 4th Dep’t 2007), *rev’d*, 10 N.Y.3d 218, 885 N.E.2d 176, 855 N.Y.S.2d 412 (2008); *People v. Porter*, 37 A.D.3d 1165, 829 N.Y.S.2d 305 (App. Div. 4th Dep’t 2007), *rev’d*, 9 N.Y.3d 966, 878 N.E.2d 998, 848 N.Y.S.2d 583 (2007); *In re Eighth Judicial Dist. Asbestos Litig.*, 32 A.D.3d 1268, 822 N.Y.S.2d 216 (App. Div. 4th Dep’t 2006), *rev’d*, 8 N.Y.3d 717, 872 N.E.2d 232, 840 N.Y.S.2d 546 (2007); *Campbell v. Cent. N.Y. Reg’l Transp. Auth.*, 28 A.D.3d 1083, 814 N.Y.S.2d 456 (App. Div. 4th Dep’t 2006), *rev’d*, 7 N.Y.3d 819, 855 N.E.2d 1165, 822 N.Y.S.2d 751 (2006); *Kolnacki v. State*, 28 A.D.3d 1176, 816 N.Y.S.2d 249 (App. Div. 4th Dep’t 2006), *rev’d*, 8 N.Y.3d 277, 864 N.E.2d 611, 832 N.Y.S.2d 481 (2007); *Frank v. Meadowlakes Dev. Corp.*, 20 A.D.3d 874, 798 N.Y.S.2d 820 (App. Div. 4th Dep’t 2005), *rev’d*, 6 N.Y.3d 687, 849 N.E.2d 938, 816 N.Y.S.2d 715 (2006); *200 Genesee St. Corp., v. City of Utica*, 20 A.D.3d 889, 798 N.Y.S.2d 814 (App. Div. 4th Dep’t 2005), *rev’d*, 6 N.Y.3d 761, 844 N.E.2d 742, 811 N.Y.S.2d 288 (2006); *In re Chase Manhattan Bank*, 21 A.D.3d 162, 798 N.Y.S.2d 615 (App. Div. 4th Dep’t 2005), *rev’d*, 6 N.Y.3d 456, 846 N.E.2d 806, 813 N.Y.S.2d 361 (2006); *Ferrugia v. N.Y. State Dept. of Health & Chautauqua Cnty. Dep’t of Soc. Servs.*, 5 A.D.3d 1116, 773 N.Y.S.2d 628 (App. Div. 4th Dep’t 2004), *rev’d*, 3 N.Y.3d 683, 818 N.E.2d 647, 785 N.Y.S.2d 6 (2004); *N.Y. Cent. Mut. Fire Ins. Co. v. Drasgow*, 12 A.D.3d 1038, 784 N.Y.S.2d 772 (App. Div. 4th Dep’t 2004), *rev’d*, 4 N.Y.3d 841, 833 N.E.2d 191, 800 N.Y.S.2d 48 (2005); *Scahill v. Greece Cent. Sch. Dist.*, 1 A.D.3d 909, 768 N.Y.S.2d 63 (App. Div. 4th Dep’t 2003), *rev’d*, 2 N.Y.3d 754, 811 N.E.2d 33, 778 N.Y.S.2d 771 (2004); *Starr v. Greece Cent. Sch. Dist.*, 1 A.D.3d 914, 767 N.Y.S.2d 719 (App. Div. 4th Dep’t 2003), *rev’d sub nom. Scahill*, 2 N.Y.3d 754, 811 N.E.2d 33, 778 N.Y.S.2d 771; *Pfister v. Watertown City Sch. Dist.*, 306 A.D.2d 826, 762 N.Y.S.2d 210 (App. Div. 4th Dep’t 2003), *rev’d*, 100 N.Y.2d 610, 799 N.E.2d 613, 767 N.Y.S.2d 390 (2003); *People v. Lewis*, 305 A.D.2d 993, 758 N.Y.S.2d 725 (App. Div. 4th Dep’t 2003), *rev’d*, 2 N.Y.3d 224, 809 N.E.2d 1106, 777 N.Y.S.2d 798 (2004); *People v. Lewis*, 305 A.D.2d 996, 758 N.Y.S.2d 573 (App. Div. 4th Dep’t 2003), *rev’d*, 2 N.Y.3d 224, 809 N.E.2d 1106, 777 N.Y.S.2d 798 (2004); *Zegarelli v. Hughes*, 303 A.D.2d 916, 756 N.Y.S.2d 674 (App. Div. 4th Dep’t 2003), *rev’d*, 3 N.Y.3d 64, 814 N.E.2d 795, 781 N.Y.S.2d 488 (2004); *Signature Realty, Inc. v. Tallman*, 303 A.D.2d 925, 757 N.Y.S.2d 171 (App. Div. 4th Dep’t 2003), *rev’d*, 2 N.Y.3d 810, 814 N.E.2d 429, 781 N.Y.S.2d 259 (2004); *James v. Cnty. of Yates Sheriff’s Dep’t*, 300 A.D.2d 989, 752 N.Y.S.2d 513 (App. Div. 4th Dep’t 2002), *rev’d sub nom. Theroux v. Reilly*, 1 N.Y.3d 232, 803 N.E.2d 364, 771 N.Y.S.2d 43 (2003); *Nitti v. Clerrico*, 291 A.D.2d 807, 737 N.Y.S.2d 210 (App. Div. 4th Dep’t 2002), *rev’d sub nom. Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002); *People v. Smith*, 283 A.D.2d 908, 730 N.Y.S.2d 583 (App. Div. 4th Dep’t 2001), *rev’d*, 97 N.Y.2d 324, 766 N.E.2d 941, 740 N.Y.S.2d 279 (2002); *People v. Deis*, 283 A.D.2d 911, 724 N.Y.S.2d 238 (App. Div. 4th Dep’t 2001), *rev’d*, 97 N.Y.2d 717, 766 N.E.2d 946, 740 N.Y.S.2d 284 (2002); *People v. Bludson*, 281 A.D.2d 948, 725 N.Y.S.2d 476 (App. Div. 4th Dep’t 2001), *rev’d*, 97 N.Y.2d 644, 761 N.E.2d 1016, 736 N.Y.S.2d 289 (2001); *People ex rel. Matthews v. N.Y. State Div. of Parole*, 272 A.D.2d 860, 706 N.Y.S.2d 810 (App. Div. 4th Dep’t 2000), *rev’d*, 95 N.Y.2d 640, 744 N.E.2d 1149, 722 N.Y.S.2d 213 (2001).

³⁰ *Hess*, 71 A.D.3d 1568, 899 N.Y.S.2d 490, *rev’d*, 15 N.Y.3d 813, 934 N.E.2d 879, 908 N.Y.S.2d 146; *Edwards*, 65 A.D.3d 829, 884 N.Y.S.2d 528, *rev’d*, 14 N.Y.3d 741, 925 N.E.2d 576, 898 N.Y.S.2d 538; *Lighthouse Pointe Prop.*, 61 A.D.3d 88, 872 N.Y.S.2d 766, *rev’d*, 14 N.Y.3d 161, 924 N.E.2d 801, 897 N.Y.S.2d 693; *Anderson*, 59 A.D.3d 1017, 873 N.Y.S.2d 796, *rev’d*, 12 N.Y.3d 901, 913 N.E.2d 407, 885 N.Y.S.2d 21; *Infante*, 55 A.D.3d 1258, 865 N.Y.S.2d 167, *rev’d*, 12 N.Y.3d 336, 907 N.E.2d 702, 879 N.Y.S.2d 824; *Schosek*, 53 A.D.3d 1037, 862 N.Y.S.2d 227, *rev’d*, 11 N.Y.3d 882, 901 N.E.2d 749, 873 N.Y.S.2d 256; *Buchanan*, 53 A.D.3d 46, 859 N.Y.S.2d 791, *rev’d*, 13 N.Y.3d 1, 912 N.E.2d 553, 884 N.Y.S.2d 337; *Kassis*, 51 A.D.3d

divided panel decision in the Fourth Department, it adopted the dissenters' rationale 85.7% of the time.

On average, the Fourth Department authors approximately thirty-two dissenting opinions per year, with 2010 being its most cantankerous (forty-seven dissents authored),³¹ and 2001 being its most agreeable (twenty-one dissents). Interestingly, the Fourth Department's dissent output has increased annually since 2007.³² However, this increase has not correlated into an increase in the number of reversals by the Court of Appeals.³³

As far as subject matter goes, the Fourth Department is more agreeable on criminal matters as compared to civil matters. During the past ten years, the Fourth Department has authored approximately three times as many dissents over civil matters than criminal matters.³⁴ Although the reversal rate by the Court of

1366, 856 N.Y.S.2d 797, *rev'd*, 12 N.Y.3d 595, 913 N.E.2d 933, 885 N.Y.S.2d 241; *Roman Catholic Diocese*, 51 A.D.3d 1392, 857 N.Y.S.2d 866, *rev'd*, 12 N.Y.3d 764, 907 N.E.2d 683, 879 N.Y.S.2d 805; *Ramos*, 38 A.D.3d 1163, 831 N.Y.S.2d 615, *rev'd*, 10 N.Y.3d 218, 885 N.E.2d 176, 855 N.Y.S.2d 412; *Porter*, 37 A.D.3d 1165, 829 N.Y.S.2d 305, *rev'd*, 9 N.Y.3d 966, 878 N.E.2d 998, 848 N.Y.S.2d 583; *In re Eighth Judicial Dist.*, 32 A.D.3d 1268, 822 N.Y.S.2d 216, *rev'd*, 8 N.Y.3d 717, 872 N.E.2d 232, 840 N.Y.S.2d 546; *Campbell*, 28 A.D.3d 1083, 814 N.Y.S.2d 456, *rev'd*, 7 N.Y.3d 819, 855 N.E.2d 1165, 822 N.Y.S.2d 751; *Kolnacki*, 28 A.D.3d 1176, 816 N.Y.S.2d 249, *rev'd*, 8 N.Y.3d 277, 864 N.E.2d 611, 832 N.Y.S.2d 481; *Frank*, 20 A.D.3d 874, 798 N.Y.S.2d 820, *rev'd*, 6 N.Y.3d 687, 849 N.E.2d 938, 816 N.Y.S.2d 715; *200 Genesee St. Corp.*, 20 A.D.3d 889, 798 N.Y.S.2d 814, *rev'd*, 6 N.Y.3d 761, 844 N.E.2d 742, 811 N.Y.S.2d 288; *Ferrugia*, 5 A.D.3d 1116, 773 N.Y.S.2d 628, *rev'd*, 3 N.Y.3d 683, 818 N.E.2d 647, 785 N.Y.S.2d 6; *N.Y. Cent. Mut. Fire Ins.*, 12 A.D.3d 1038, 784 N.Y.S.2d 772, *rev'd*, 4 N.Y.3d 841, 833 N.E.2d 191, 800 N.Y.S.2d 48; *Scahill*, 1 A.D.3d 909, 768 N.Y.S.2d 63, *rev'd*, 2 N.Y.3d 754, 811 N.E.2d 33, 778 N.Y.S.2d 771; *Starr*, 1 A.D.3d 914, 767 N.Y.S.2d 719, *rev'd sub nom. Scahill*, 2 N.Y.3d 754, 811 N.E.2d 33, 778 N.Y.S.2d 771; *Pfister*, 306 A.D.2d 826, 762 N.Y.S.2d 210, *rev'd*, 100 N.Y.2d 610, 799 N.E.2d 613, 767 N.Y.S.2d 390; *Lewis*, 305 A.D.2d 993, 758 N.Y.S.2d 725, *rev'd*, 2 N.Y.3d 224, 809 N.E.2d 1106, 777 N.Y.S.2d 798; *Lewis*, 305 A.D.2d 996, 758 N.Y.S.2d 573, *rev'd*, 2 N.Y.3d 224, 809 N.E.2d 1106, 777 N.Y.S.2d 798; *Zegarelli*, 303 A.D.2d 916, 756 N.Y.S.2d 674, *rev'd*, 3 N.Y.3d 64, 814 N.E.2d 795, 781 N.Y.S.2d 488; *James*, 300 A.D.2d 989, 752 N.Y.S.2d 513, *rev'd sub nom. Theroux*, 1 N.Y.3d 232, 803 N.E.2d 364, 771 N.Y.S.2d 43; *Nitti*, 291 A.D.2d 807, 737 N.Y.S.2d 210, *rev'd sub nom. Toure*, 98 N.Y.2d 345, 774 N.E.2d 1197, 746 N.Y.S.2d 865; *Smith*, 283 A.D.2d 908, 730 N.Y.S.2d 583, *rev'd*, 97 N.Y.2d 324, 766 N.E.2d 941, 740 N.Y.S.2d 279; *Deis*, 283 A.D.2d 911, 724 N.Y.S.2d 238, *rev'd*, 97 N.Y.2d 717, 766 N.E.2d 946, 740 N.Y.S.2d 284; *Bludson*, 281 A.D.2d 948, 725 N.Y.S.2d 476, *rev'd*, 97 N.Y.2d 644, 761 N.E.2d 1016, 736 N.Y.S.2d 289; *People ex rel. Matthews*, 272 A.D.2d 860, 706 N.Y.S.2d 810, *rev'd*, 95 N.Y.2d 640, 744 N.E.2d 1149, 722 N.Y.S.2d 213.

³¹ This is also interesting because this study includes only ten months of the 2010 calendar year, yet 2010 has had the most dissents authored in a year by far. The second highest year was 2009, which had thirty-nine dissents.

³² Twenty-six in 2007; 32 in 2008; 39 in 2009; and 47 in 2010. See *infra* Table 1.

³³ Three in 2007; 7 in 2008; 3 in 2009; and 1 in 2010. See *infra* Table 1. Note, however, that some Fourth Department cases which featured a dissent may still be pending before the Court of Appeals at the time of this publication.

³⁴ Two hundred and fifty-seven civil dissents compared to 93 criminal dissents; about a 3:1 ratio. See *infra* Table 1.

Appeals roughly reflects this ratio,³⁵ statistically speaking, a Fourth Department dissent is just as likely to be vindicated whether it deals with criminal matter or a civil matter.³⁶

This larger library of civil law dissents (compared to criminal law) is further reflected by the justice's voting behavior. Only three of the twenty-one justices relevant to this study cast more dissenting votes in criminal matters compared to civil matters.³⁷ These justices were Justice Wisner, who dedicated 64.3% of his votes to criminal matters; Justice Lunn, dedicating 55.6% of his dissents to criminal matters; and the recently-appointed Justice Sconiers, who at the time of this study had cast her only dissenting vote during a criminal matter.

The most noticeable feature of the Fourth Department is the voting pattern of the justices. Of the relevant cases, only about 35% of the dissenting opinions featured a justice who dissented alone.³⁸ Certain justices rarely, if ever, dissent alone; notably, Justice Centra (no solo dissents out of twenty total dissenting votes), Justice Pigott (one solo dissent out of twenty-two total dissent votes), and Justice Pine (three solo dissents out of thirty-three total dissent votes). Meanwhile, other justices find themselves dissenting alone much more often, including Justice Scudder (seventeen solo dissents), Justice Hayes (fourteen), Justice Kehoe (thirteen), and Justice Green (thirteen). However, the tendency for Fourth Department justices to avoid authoring solo dissents is reinforced by the Court of Appeals, which has vindicated only five solo dissents in the past ten years.³⁹ Meanwhile, the other twenty-five vindicated decisions featured dissents that were joined by two

³⁵ During the relevant time period, the Court of Appeals reversed twenty-five decisions that dealt with civil matters, compared to ten reversals that dealt with criminal matters. See *infra* Table 1.

³⁶ A ninety percent vindication rate on criminal dissents compared to an 88% vindication rate on dissents dealing with civil matters.

³⁷ Hon. Donald J. Wisner (6 civil dissent votes compared to 9 criminal dissent votes); Hon. Robert Joseph Lunn (4 civil compared to 5 criminal); and Hon. Rose H. Sconiers (0 civil compared to 1 criminal; appointed to the Fourth Department February 2, 2010).

³⁸ There were 123 solo dissenting opinions out of the 349 total dissents.

³⁹ *Lighthouse Pointe Prop. Assocs. LLC v. N.Y. State Dep't of Env'tl. Conservation*, 61 A.D.3d 88, 872 N.Y.S.2d 766 (App. Div. 4th Dep't 2009), *rev'd*, 14 N.Y.3d 161, 924 N.E.2d 801, 897 N.Y.S.2d 693 (2010); *Ramos v. Howard Indus., Inc.*, 38 A.D.3d 1163, 831 N.Y.S.2d 615 (App. Div. 4th Dep't 2007), *rev'd*, 10 N.Y.3d 218, 885 N.E.2d 176, 855 N.Y.S.2d 412 (2008); *People v. Porter*, 37 A.D.3d 1165, 829 N.Y.S.2d 305 (App. Div. 4th Dep't 2007), *rev'd*, 9 N.Y.3d 966, 878 N.E.2d 998, 848 N.Y.S.2d 583 (2007); *In re Eighth Judicial Dist. Asbestos Litig.*, 32 A.D.3d 1268, 822 N.Y.S.2d 216 (App. Div. 4th Dep't 2006), *rev'd*, 8 N.Y.3d 717, 872 N.E.2d 232, 840 N.Y.S.2d 546 (2007); *Zegarelli v. Hughes*, 303 A.D.2d 916, 756 N.Y.S.2d 674 (App. Div. 4th Dep't 2003), *rev'd*, 3 N.Y.3d 64, 814 N.E.2d 795, 781 N.Y.S.2d 488 (2004).

justices. The most successful justice with respect to solo vindications is Justice Kehoe, with a (grand) total of two.

Finally, dissenting Fourth Department justices have been vindicated more often when holding in favor of the defendant. Of all thirty vindicated decisions, twenty-one have been in favor of the defendant. This trend holds true in both civil matters, where fifteen of the twenty-one vindicated dissents were pro-defendant; and in criminal matters, where six of the nine vindicated dissents were pro-defendant.

TABLE 1: YEAR-BY-YEAR SUMMARY FOR 2000 TO 2010

<i>Year</i>	<i>Total Number of Case Decided</i>	<i>Number of Divided Panels</i>	<i>Number of Divided Cases Overturned by the Court of Appeals</i>	<i>Number of Vindicated Dissents</i>	<i>Number of Vindications in Civil Cases</i>	<i>Number of Vindications in Criminal Cases</i>
2010 ⁴⁰	1413	47	1	1	1	0
2009	1554	39	3	3	2	1
2008	2078	32	7	5	4	1
2007	2249	26	3	2	1	1
2006	2049	26	3	3	3	0
2005	2156	29	3	2	2	0
2004	1778	37	2	2	2	0
2003	1646	38	7	6	4	2
2002	1681	28	2	2	2	0
2001	1781	21	3	3	0	3
2000	2105	26	1	1	0	1

⁴⁰ As of October 1, 2010.

III. DIVIDED PANEL BEHAVIOR OF FOURTH DEPARTMENT JUSTICES

A. *The "Average" Fourth Department Justice*

When looking at all of the cases decided by the Fourth Department where a dissent was filed, some patterns begin to emerge. Although the sample is somewhat tainted by justices who were recently appointed, some voting behavior becomes apparent to the observer. Based on all of this data, certain patterns reveal themselves, specifically regarding the "average" divided panel-voting behavior of the justices in the Fourth Department.

In divided panel cases, an "average" Fourth Department justice will side with the dissent 31.8% of the time. Of these, the average Fourth Department justice will dedicate 71.9% of dissents towards civil matters, while the remaining 28.1% of votes will be dedicated to criminal matters. In this respect, Justice Centra would be considered the "average" Fourth Department justice. When there is a divided panel, Justice Centra has sided with the dissent 31.2% of the time, dedicating 70% of the dissents towards civil matters, and 30% toward criminal matters.

Interestingly, justices who have voted on the most divided panels over the past ten years have generally abided by this "dissenting behavior"—albeit in different respects. For example, Presiding Justice Scudder, who has voted in the most divided panels in the past ten years (168), has a nearly average Fourth Department voting pattern, siding with the dissent 40.5% of the time when there is a divided panel, and dedicating 66.2% of his dissents to civil matters and 33.8% to criminal matters. Similarly, Justice Pine, who has voted in the fifth most divided panels (134), displays a similar voting pattern: siding with the dissent 24.6% of the time, while dedicating 69.7% of dissents to civil matters and 30.3% to criminal matters. Justice Green, who has voted in the third most divided panels (145), dedicates 66.7% of dissents to civil matters and 33.3% to criminal matters. Similarly, Justice Hurlbutt, who has voted on the fourth most divided panels (137), sides with the dissent 25.5% of the time.

On the other hand, Justice Gorski—who has served on the second most divided panels (156)—does not abide by typical Fourth Department dissenting behavior, siding with the dissent 42.3% of the time, while dedicating 86.4% of dissents to civil matters and 13.6% to criminal matters.

TABLE 2: DISSENTING BEHAVIOR OF JUSTICES SERVING ON THE MOST DIVIDED PANELS 2000 TO 2010

<i>Justice</i>	<i>Total Number of Divided Panels</i>	<i>Number of Divided Panels Where Justice Joined the Dissent</i>	<i>Percentage of Divided Panels Where Justice Joined the Dissent</i>	<i>Percentage of Dissents with Criminal Issues</i>	<i>Percentage of Dissents with Civil Issues</i>
Scudder	168	68	40.5%	33.8%	66.2%
Gorski	156	66	42.5%	13.6%	86.4%
Green	145	66	45.5%	33.3%	66.7%
Hurlbutt	137	35	25.5%	17.1%	82.9%
Pine	134	33	24.6%	30.3%	69.7%
Dep't Avg.	N/A	N/A	31.8%	28.1%	71.9%

B. Vindication Rates

The statistic that readers will find most intriguing about this study is the vindication rates of the Fourth Department justices. The average Fourth Department justice has a 7.5% vindication rate by the Court of Appeals.⁴¹ The majority of Fourth Department justices who have served on the most divided panels reflect this average. Indeed, four of the five justices hover around this average: Justice Scudder has a vindication rate of 8.8%; Justice Gorski follows with a vindication rate of 7.6%; Justice Green has a vindication rate of 6.1%; and Justice Pine has a vindication rate of 6.1%. However, Justice Hurlbutt—who has voted on the second most divided panels—has an impressive vindication rate of 17.1%.

Interestingly, Justice Hurlbutt has only the third highest vindication rate of all the Fourth Department Justices serving during the period of this study. Former Presiding Justice Pigott, has an impressive 18.2% vindication rate, while Former Justice Lawton, who retired from the bench in 2005,⁴² had an identically impressive 18.2% vindication rate.

⁴¹ See *infra* Table 3.

⁴² *Biographies of Former Justices of the Appellate Division*, *supra* note 28.

Overall, the justice with the most vindicated dissents was a three-way tie between Justices Scudder, Lawton, and Hurlbutt, each with six. Justices Kehoe and Gorski, who each had five dissents vindicated, closely followed this tie.

It is important to note that the justices who have the most overall dissents had a relatively average vindication rate by the Court of Appeals. Despite siding with the dissent the most times with sixty-eight, Justice Scudder had a relatively average vindication rate of 8.8%. Similarly, Justice Gorski, who cast the second most dissenting votes with sixty-six, had a vindication rate of 7.6%. Finally, Justice Green's sixty-six dissenting votes only resulted in a below average 6.1% vindication rate by the Court of Appeals.

Justices who had the highest percentage of dissents further reflect this trend. Justices Carni, Green, and Peradotto all had the highest percentage of dissenting votes in cases in which they voted—and yet again, all three had relatively average vindication rates. In divided panel cases, Justice Green sided with the dissent 45.5% of the time, yet had a vindication rate of only 6.1%. Justice Peradotto sided with the dissent 42.7% of the time and had a vindication rate of 9.4%. Finally, Justice Carni sided with the dissent 42.4% of the time, and had a 0% vindication rate.

TABLE 3: VINDICATION RATES

<i>Justice</i>	<i>Total Dissents</i>	<i>Total Vindications</i>	<i>Vindication Percentage</i>
Pigott	22	4	18.2%
Lawton	33	6	18.2%
Hurlbutt	35	6	17.1%
Scudder	68	6	8.8%
Gorski	66	5	7.6%
Green	65	4	6.1%
Pine	33	2	6.1%
Dep't Average			7.5%

C. Voting Trends

As mentioned above, one of the noticeable traits of the Fourth Department is that when a dissent is authored, more often than not another judge on the panel will join.⁴³

Typically, a Fourth Department justice who dissents will be joined by another justice sitting on the panel 76.7% of the time. Conversely, a Fourth Department justice will remain alone and file a dissent that is not joined by their brethren 23.2% of the time.

Interestingly, three of the five justices who have served on the most divided panels do not generally abide by this average. Justice Gorski filed solo dissents 12.1% of the time and was part of a multiple dissent 87.9% of the time; Justice Hurlbutt filed solo dissents 14.3% of the time and was part of a multiple dissent 85.7% of the time; and Justice Pine filed solo dissents 9.1% of the time and was part of a multiple dissent 90.1% of the time.

On the other hand, Justice Scudder—once again, the justice who has served on the most divided panels—abides by this voting behavior, filing a solo dissent in 25% of his dissents, while being part of a multiple dissent in 75% of his dissents. Justice Green, who has voted in the third most divided panels (145), has a similar dissenting pattern: filing a solo dissent 19.7% of the time, while being part of a multiple dissent 80.3% of the time.

Justice Kehoe had the highest percentage of solo dissents, filing solo in 40.6% of divide panel cases. Meanwhile, Justice Pigott has by far the lowest percentage of solo dissents. Remarkably, only one of the twenty-two total dissenting votes cast by Pigott were not joined by his brethren, accounting for only 4.5% of his total votes. This apparent voting “clout” is particularly notable because, as noted above, Justice Pigott (along with Justice Lawton) had the highest vindication rate of all Fourth Department justices considered in this study (18.2%), and was appointed to the Court of Appeals in 2006. Given these factors, it is interesting to consider whether a higher vindication rate with the Court of Appeals affects the voting behavior of a Fourth Department justice.

⁴³ In relevant cases, only about 35% of the dissenting opinions featured a justice who was dissenting alone.

D. Does Vindication Equal Voting Power?

Based on Justice Pigott's impressive vindication rate combined with his established history of rarely joining a dissent without the support of another justice, it is interesting to consider whether Fourth Department voting behavior might be influenced by a justice's vindication rate by the Court of Appeals. Empirically speaking, a justice's vindication rate may be argued to affect the voting behavior of other justices. This is further supported by the consideration that the Court of Appeals has vindicated only five solo dissents, as well as the voting behavior of split panel cases when the six justices with the highest vindication rates were involved. Four of these six justices rarely dissent alone, and are well below the average solo dissent rate of 23.2%. However, the remaining two justices have among the highest solo dissent rates.

During the past ten years, the six Fourth Department justices with the highest vindication rates were: Justices Pigott and Lawton; Justice Hurlbutt; Justice Kehoe; Justice Wisner; and Justice Centra. As mentioned above, Justice Pigott tied with Justice Lawton for the highest vindication rate of any justice during this study—18.2% of his dissents were ultimately vindicated by the Court of Appeals. During this time, he voted in only one dissent where he was not joined by another justice, accounting for only 4.5% of his dissents. Similarly, Justice Hurlbutt had the third highest vindication rate of 17.1%, and only 14.3% of his dissents were filed alone. Justice Wisner had the fifth highest vindication rate of 14.3, and only 7.1% of his dissents were filed without another Justice joining him. Finally, Justice Centra had the sixth highest vindication rate of 10%, and was never alone when siding with the dissent.

On the other hand, Justice Pigott tied Justice Lawton for the highest vindication rate of 18.2%; yet of his total dissents, he filed a solo dissent 36.4% of the time. Justice Kehoe had the fourth highest vindication rate of 15.6%, and filed dissents without any of his brethren joining him in an impressive 40.6% of his dissents.

TABLE 4: HIGHEST VINDICATION RATES & CORRESPONDING PANEL VOTING

<i>Justice</i>	<i>Vindication Percentage</i>	<i>Percentage of Dissents Joined</i>	<i>Percentage of Solo Dissents</i>
Pigott	18.2%	95.5%	4.5%
Lawton	18.2%	63.6%	36.4%
Hurlbutt	17.6%	85.7%	14.3%
Kehoe	15.6%	59.4%	40.6%
Wisner	14.3%	92.9%	7.1%
Centra	10.0%	100.0%	0.0%
4th Dep't	7.5%	72.9%	23.2%

IV. VINDICATION DATA

A. Criminal Law

Only nine criminal cases account for the thirty total vindications of the Fourth Department. The Fourth Department's most successful vindication years were 2001 and 2003, where Fourth Department dissenters were awarded three and two vindications by the Court of Appeals, respectively. However, since 2000, there have been five separate years where no criminal vindications have been handed down from the Court of Appeals: 2002, 2004, 2005, 2006, and 2010.

Of the justices with the most total vindications in criminal law, Justice Gorski had the most with four vindications. Notably, Justice Gorski also had the only criminal vindication in which he was the lone dissenting justice.⁴⁴ Interestingly, all of Justice Gorski's vindications were pro-defendant cases and contained rationales that focused on due process complaints,⁴⁵ the Sixth

⁴⁴ *People v. Porter*, 37 A.D.3d 1165, 829 N.Y.S.2d 305 (App. Div. 4th Dep't 2007), *rev'd*, 9 N.Y.3d 966, 878 N.E.2d 998, 848 N.Y.S.2d 583 (2007).

⁴⁵ *People v. Buchanan*, 53 A.D.3d 46, 859 N.Y.S.2d 791 (App. Div. 4th Dep't 2008), *rev'd*, 13 N.Y.3d 1, 912 N.E.2d 553, 884 N.Y.S.2d 337 (2009).

Amendment invocation of counsel,⁴⁶ and the Sixth Amendment guarantee of effective assistance of counsel.⁴⁷ This pro-defendant pattern displayed by Justice Gorski is in line with the rest of the vindications in Fourth Department dissents, as six of the nine total vindications had pro-defendant rationales.

Justice Kehoe had the second most vindications in criminal cases with three vindications. However, unlike the majority of the criminal vindications, two of Kehoe's three vindications were pro-state, one grounded in a harmless error/overwhelming guilt rationale,⁴⁸ and the other siding with the State Parole Board in a *habeas* petition case.⁴⁹

Justices Lawton and Green each had the third most vindicated dissents in criminal matters with two each. In both of his vindicated dissents, Justice Gorski joined Justice Lawton, and both dissents contained a pro-defendant rationale grounded in the Sixth Amendment guarantee of effective assistance of counsel.⁵⁰ Meanwhile, Justice Green's two vindications were based on pro-defendant rationales which both dealt with jury issues; one rationale grounded in juror bias,⁵¹ and the other grounded in the charges read to the jury.⁵²

Notably, Presiding Justice Scudder only had one vindication in criminal law, and that was a pro-State rationale. Joined by Justice Peradotto, their vindicated dissent was based on a purported Fourth Amendment violation where they were ultimately vindicated for finding that a traffic stop and resulting search was constitutional.⁵³

⁴⁶ *Porter*, 37 A.D.3d 1165, 829 N.Y.S.2d 305, *rev'd*, 9 N.Y.3d 966, 878 N.E.2d 998, 848 N.Y.S.2d 583.

⁴⁷ *People v. Lewis*, 305 A.D.2d 993, 758 N.Y.S.2d 725 (App. Div. 4th Dep't 2003), *rev'd*, 2 N.Y.3d 224, 809 N.E.2d 1106, 777 N.Y.S.2d 798 (2004); *People v. Lewis*, 305 A.D.2d 996, 758 N.Y.S.2d 573 (App. Div. 4th Dep't 2003), *rev'd*, 2 N.Y.3d 224, 809 N.E.2d 1106, 777 N.Y.S.2d 798 (2004).

⁴⁸ *People v. Smith*, 283 A.D.2d 908, 730 N.Y.S.2d 583 (App. Div. 4th Dep't 2001), *rev'd*, 97 N.Y.2d 324, 766 N.E.2d 941, 740 N.Y.S.2d 279 (2002).

⁴⁹ *People ex. rel. Matthews v. N.Y. State Div. of Parole*, 272 A.D.2d 860, 706 N.Y.S.2d 810 (App. Div. 4th Dep't 2000), *rev'd*, 95 N.Y.2d 640, 744 N.E.2d 1149, 722 N.Y.S.2d 213 (2001).

⁵⁰ *Lewis*, 305 A.D.2d 993, 758 N.Y.S.2d 725, *rev'd*, 2 N.Y.3d 224, 809 N.E.2d 1106, 777 N.Y.S.2d 798; *Lewis*, 305 A.D.2d 996, 758 N.Y.S.2d 573, *rev'd*, 2 N.Y.3d 224, 809 N.E.2d 1106, 777 N.Y.S.2d 798.

⁵¹ *People v. Bludson*, 281 A.D.2d 948, 725 N.Y.S.2d 476 (App. Div. 4th Dep't 2001), *rev'd*, 97 N.Y.2d 644, 761 N.E.2d 1016, 736 N.Y.S.2d 289 (2001).

⁵² *People v. Deis*, 283 A.D.2d 911, 724 N.Y.S.2d 238 (App. Div. 4th Dep't 2001), *rev'd*, 97 N.Y.2d 717, 766 N.E.2d 946, 740 N.Y.S.2d 284 (2002).

⁵³ *People v. Edwards*, 65 A.D.3d 829, 884 N.Y.S.2d 528 (App. Div. 4th Dep't 2009), *rev'd*, 14 N.Y.3d 741, 925 N.E.2d 576, 898 N.Y.S.2d 538 (2010).

B. Civil Law

The remaining twenty-one vindicated dissents of the Fourth Department all revolved around civil law issues. The Fourth Department's most successful years in this regard were 2008 and 2003, when dissenters were vindicated four times each year by the Court of Appeals. Notably, 2000 and 2001 have been the only two years where no civil vindications were handed down; since then, there has been at least one civil vindication handed down by the Court of Appeals.

Once again, the Fourth Department vindications were most often granted when finding in favor of the defendant: fourteen of the twenty-one civil vindications were pro-defendant rationales. Interestingly, Justice Smith seemed to buck the pro-defendant trend of her colleagues and has three pro-plaintiff vindications in civil matters. Two of Smith's vindications were pro-plaintiff dissents, finding against the Department of Environmental Conservation⁵⁴ and a Town Planning Board.⁵⁵ The remaining vindication was a contract action against an insurance agency.⁵⁶

Justice Hurlbutt had the greatest overall number of vindications in civil matters, with six vindications. All of Hurlbutt's vindications contained pro-defendant rationales. Interestingly, in four of these six vindications, Hurlbutt found in favor of public institutions, siding with a county coroner,⁵⁷ a regional transportation authority,⁵⁸ and twice with a school.⁵⁹ In the remaining two cases, Hurlbutt dissented in favor of a church⁶⁰ and a third-party defendant.⁶¹

Presiding Justice Scudder had the second most civil vindications, with five. Scudder's vindications do not abide by any set, specific behavior. Two of his vindications were pro-State,⁶² yet one

⁵⁴ *Lighthouse Pointe Prop. Assocs. LLC v. N.Y. State Dep't of Env'tl. Conservation*, 61 A.D.3d 88, 872 N.Y.S.2d 766 (App. Div. 4th Dep't 2009), *rev'd*, 14 N.Y.3d 161, 924 N.E.2d 801, 897 N.Y.S.2d 693 (2010).

⁵⁵ *Anderson v. Town of Chili Planning Bd.*, 59 A.D.3d 1017, 873 N.Y.S.2d 796 (App. Div. 4th Dep't 2009), *rev'd*, 12 N.Y.3d 901, 913 N.E.2d 407, 885 N.Y.S.2d 21 (2009).

⁵⁶ *Kassis v. Ohio Cas. Ins. Co.*, 51 A.D.3d 1366, 856 N.Y.S.2d 797 (App. Div. 4th Dep't 2008), *rev'd*, 12 N.Y.3d 595, 913 N.E.2d 933, 885 N.Y.S.2d 241 (2009).

⁵⁷ *Infante*, 55 A.D.3d 1258, 865 N.Y.S.2d 167.

⁵⁸ *Campbell*, 28 A.D.3d 1083, 814 N.Y.S.2d 456.

⁵⁹ *Scahill*, 1 A.D.3d 909, 768 N.Y.S.2d 63; *Starr*, 1 A.D.3d 914, 767 N.Y.S.2d 719.

⁶⁰ *Roman Catholic Diocese of Rochester*, 51 A.D.3d 1392, 857 N.Y.S.2d 866.

⁶¹ *Frank*, 20 A.D.3d 874, 798 N.Y.S.2d 820, *rev'd*, 6 N.Y.3d 687, 849 N.E.2d 938, 816 N.Y.S.2d 715.

⁶² *Hess v. W. Seneca Cent. Sch. Dist.*, 71 A.D.3d 1568, 899 N.Y.S.2d 490 (App. Div. 4th Dep't 2010), *rev'd*, 15 N.Y.3d 813, 934 N.E.2d 879, 908 N.Y.S.2d 146 (2010); *Infante*, 55 A.D.3d 1258, 865 N.Y.S.2d 167.

vindication was against a state agency.⁶³ Similarly, two of his five vindications were pro-plaintiff,⁶⁴ while the other three vindications were pro-defendant.⁶⁵

Justice Lawton had the third most civil vindications, with four. Three of Justice Lawton's vindications were based on pro-defendant rationales.⁶⁶ Otherwise, Justice Lawton's vindications do not generally follow a specific pattern, as two decisions have dealt with insurance issues (arbitration⁶⁷ and personal injury⁶⁸), and the remainder dealt with municipal contract issues⁶⁹ and employment benefits.⁷⁰

Former Presiding Justice Pigott had three of his four vindications in civil matters. Two of the vindications were pro-defendant rationales that favored a school district,⁷¹ and the other vindication was pro-plaintiff.⁷²

Only four of the civil vindications contained a solo dissenter. Justice Kehoe had the most with two.⁷³ Each of these vindications offered a pro-defendant rationale, and dealt with a negligence action.⁷⁴ Interestingly, upon reaching the Court of Appeals, two of

⁶³ *Ferrugia v. N.Y. State Dept. of Health & Chautauqua Cnty. Dep't of Soc. Servs.*, 5 A.D.3d 1116, 773 N.Y.S.2d 628 (App. Div. 4th Dep't 2004), *rev'd*, 3 N.Y.3d 683, 818 N.E.2d 647, 785 N.Y.S.2d 6 (2004).

⁶⁴ *Ferrugia*, 5 A.D.3d 1116, 773 N.Y.S.2d 628; *Pfister v. Watertown City Sch. Dist.*, 306 A.D.2d 826, 762 N.Y.S.2d 210 (App. Div. 4th Dep't 2003), *rev'd*, 100 N.Y.2d 610, 799 N.E.2d 613, 767 N.Y.S.2d 390 (2003).

⁶⁵ *Hess*, 71 A.D.3d 1568, 899 N.Y.S.2d 490; *Infante*, 55 A.D.3d 1258, 865 N.Y.S.2d 167; *Nitti v. Clerrico*, 291 A.D.2d 807, 737 N.Y.S.2d 210 (App. Div. 4th Dep't 2002), *rev'd sub nom.* *Toure v. Avis Rent A Car Sys., Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002).

⁶⁶ *200 Genesee St. Corp., v. City of Utica*, 20 A.D.3d 889, 798 N.Y.S.2d 814 (App. Div. 4th Dep't 2005), *rev'd*, 6 N.Y.3d 761, 844 N.E.2d 742, 811 N.Y.S.2d 288 (2006); *N.Y. Cent. Mut. Fire Ins. Co. v. Drasgow*, 12 A.D.3d 1038, 784 N.Y.S.2d 772 (App. Div. 4th Dep't 2004), *rev'd*, 4 N.Y.3d 841, 833 N.E.2d 191, 800 N.Y.S.2d 48 (2005); *Nitti*, 291 A.D.2d 807, 737 N.Y.S.2d 210.

⁶⁷ *N.Y. Cent. Mut. Fire Ins. Co.*, 12 A.D.3d 1038, 784 N.Y.S.2d 772.

⁶⁸ *Nitti*, 291 A.D.2d 807, 737 N.Y.S.2d 210.

⁶⁹ *200 Genesee St. Corp.*, 20 A.D.3d 889, 798 N.Y.S.2d 814.

⁷⁰ *James v. Cnty. of Yates Sheriff Dep't*, 300 A.D.2d 989, 752 N.Y.S.2d 513 (App. Div. 4th Dep't 2002), *rev'd sub nom.* *Theroux v. Reilly*, 1 N.Y.3d 232, 803 N.E.2d 364, 771 N.Y.S.2d 43 (2003).

⁷¹ *Scahill v. Greece Cent. Sch. Dist.*, 1 A.D.3d 909, 768 N.Y.S.2d 63 (App. Div. 4th Dep't 2003); *Starr v. Greece Cent. Sch. Dist.*, 1 A.D.3d 914, 767 N.Y.S.2d 719 (App. Div. 4th Dep't 2003).

⁷² *Pfister v. Watertown City Sch. Dist.*, 306 A.D.2d 826, 762 N.Y.S.2d 210 (App. Div. 4th Dep't 2003).

⁷³ *In re Eighth Judicial Dist. Asbestos Litig.*, 32 A.D.3d 1268, 822 N.Y.S.2d 216 (App. Div. 4th Dep't 2006), *rev'd*, 8 N.Y.3d 717, 872 N.E.2d 232, 840 N.Y.S.2d 546 (2007); *Zegarelli v. Hughes*, 303 A.D.2d 916, 756 N.Y.S.2d 674 (App. Div. 4th Dep't 2003), *rev'd*, 3 N.Y.3d 64, 814 N.E.2d 795, 781 N.Y.S.2d 488 (2004).

⁷⁴ *In re Eighth Judicial Dist.*, 32 A.D.3d 1268, 822 N.Y.S.2d 216; *Zegarelli*, 303 A.D.2d 916,

the four vindicating decisions were authored by former Fourth Department Presiding Justice Pigott,⁷⁵ the same justice who had the lowest percentage of solo dissents in this study.

V. CONCLUSION

A few points need to be reemphasized when concluding this study. The first is that all of the statistics presented here are just that—statistics. By no means should the reader infer from these statistics that certain justices are superior or more capable than others. This should be especially emphasized with the vindication statistics, because a “vindication do[es] not necessarily correlate to good or bad, right or wrong, or wise or foolish.”⁷⁶ The same goes for the rates at which justices filed dissents by themselves or with another justice; this does not imply that a particular justice is more or less popular with his or her brethren, or that their rationales are better or worse. The bottom line is that this article is meant to be fun,⁷⁷ while presenting mere statistical and correlational findings regarding dissents written by Fourth Department justices that were eventually vindicated by the Court of Appeals.

Secondly, the author’s interpretations of the justices’ voting patterns for dissents are based on a relatively small sample. That being said, the patterns and “behaviors” which are suggested by this research are certainly open to additional interpretation, and are certainly worthy of further, more in-depth research and analysis. Therefore, while the author hopes that his interpretations will be generally “vindicated” by the reader, he certainly welcomes any “dissenting opinions” (in the form of future studies) that this article may inspire.

756 N.Y.S.2d 674.

⁷⁵ *Ramos v. Howard Indus., Inc.*, 38 A.D.3d 1163, 831 N.Y.S.2d 615 (App. Div. 4th Dep’t 2007), *rev’d*, 10 N.Y.3d 218, 885 N.E.2d 176, 855 N.Y.S.2d 412 (2008); *In re Eighth Judicial Dist.*, 32 A.D.3d 1268, 822 N.Y.S.2d 216.

⁷⁶ Jason A. Cherna, et al., *Appellate Division on Appeal: The Justices’ Rates of Agreement, Rejection, and Vindication by the Court of Appeals*, 70 ALB. L. REV. 983, 992 (2007).

⁷⁷ The author cannot emphasize enough that his use of the word “fun” here is purely relative and is in no way meant to give anyone the idea that statistics, research, or paper writing are widely considered fun by the general population.